Case Note

A School's Right to Dismiss Staff for Non-Abusive Touching of Students

Romolo Luigi Puccio v Catholic Education Office and Catholic Church Endowment Society (Incorporated)

Industrial Relations Court of Australia – 198/1996 [www.austlii.edu.au/au/cases/cth/irc/960198]

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Abuse of students, sexual and otherwise, by teachers has received increasing attention of Australian courts in recent years and there are indications that further hearings will take place as students seek legal redress for alleged harms. Although it has long been the situation that teachers have been advised - while undertaking pre-service and in-service courses - not to touch students, there is still, nevertheless, concern among teachers and others in schools whether they are able, safely to touch students at all. Such concern has certainly been exacerbated by the community attention that the recent cases have occasioned.

Aware of the intense professional concern among educators over the issue the Queensland Court of Appeal recognised in 1995 (in *Horan v Ferguson*) that teaching is a tactile profession and that touching students is a normal part of school life. This is particularly the case at primary school levels but will also be the case in secondary institutions when sporting or other activities are taking place. Such touching the Court noted, is acceptable provided there is no abuse and that the student has not, either impliedly or explicitly, removed their permission to be touched. Obviously, in any emergency situation where a student's well-being is at risk, as could be the case when a student is injured or having some form of fit or where there is some danger such as a fire, then it might be necessary to touch a student whether or not she/he has removed permission to do so. Indeed as the best interest of the student should be the paramount concern, a failure to assist or direct a student that involves touching, may well amount to a breach of the duty of care owed for their physical welfare.

Regardless however of whether a teacher is legally able to touch a student the question remains of whether a school is able to insist on its staff not doing so. This case note deals with an appeal- in the Industrial Relations Court of Australia, South Australian District Registry - by a teacher for reinstatement after his dismissal for failing to follow the policy of the school regarding

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touching of students. It clearly demonstrates the strategies schools must have in place to support a policy of non-touching of students.

Background

Romolo Luigi Puccio, (the applicant), commenced teaching at the Mater Christie primary school in 1982 and by all accounts he was a committed and skilful teacher. One of his duties was the teaching of physical education and he was involved, as well, in school sports activities

In May 1991 the applicant along with other members of the school staff attended a three-day Protective Behaviours course at the school. The program was to in-service teachers in anti-victimisation and empowerment strategies to be given to students from Grade 1 at the school as part of the Protective Behaviours program. This was a course that had received considerable community and professional support. As part of the in-service program, the school regulation prohibiting the touching of children was emphasised. Puccio, however, declared that he believed the policy of non-touching 'was over the hill'. He was, though, clearly advised that he would be very unwise not to heed the regulation as it reflected 'trend[s] in the community, particularly relating to men and their relationships with children'. He was also informed that the school regulation was 'black and white, "do not touch children"'. In this regard the school regulation forbade the touching of both male and female students.

In order to further emphasise the non-touching policy, in mid December, 1991, the principal of the school drew the attention of school staff to an article in an ANGEE (Association of Non-Government Education Employees) publication in which teachers were strongly advised not to touch children.

Notwithstanding the very clear school policy, Puccio was involved, over a period of three years in a number of incidents involving his touching of students. After one such incident in June 1992, the Principal spoke to him about his behaviour and warned that to ignore her advice would 'put his job at risk'. In September of that year the principal, after having received a complaint about his touching a student, carried out an interview with him. He was then presented with a letter in which he was formally warned that some students and their parents as well as school staff were concerned about his behaviour. The letter went on to state in unequivocal terms that he was to:

- Cease, immediately all physical contact with students;
- Reorganise the computer corner in his classroom so as to make it a more public area;
- Only speak to female students, when he had to address them privately, in a public place;
- Have any female student working on her own under his supervision to do so in the library;
- Only speak to female students when they were in a group.

The letter concluded with Puccio being advised that any further breach of the school rule would result in the principal issuing him with a 'letter of warning' which could lead to his dismissal.

Notwithstanding the advice and warnings he had received, the applicant was observed alone with a female student in a site in a classroom where he could not be readily seen. Shortly afterwards he was observed with an arm around a Grade 6 female student. Both incidents were contrary to the instructions contained in the principal's letter to him and these, together with another complaint from a parent, led to another formal interview with the principal and, on this occasion two other persons. This meeting was followed by a second letter reiterating the instructions contained in the first and it concluded with the warning that 'any further instances of inappropriate touching of students will, if substantiated, result in your dismissal'.

Throughout the two interviews and on other occasions the applicant had steadfastly maintained that he had no indecent intent in touching students and that he was simply a tactile person who believed touching to be a core component of effective relationships with students and not at all improper.

The advice and warnings were insufficient to stop the applicant from offending and as a result of his having a female student sit on his lap while he was demonstrating a long jump technique together with his having been seen at a school 'beach-a-thon' with his arm around another female student, he was called to two meetings over the period 27-29 November, 1995. Present at these meetings were the school principal, the co-ordinator of the Human Resources of the Catholic Education Office, the Legal and Industrial Officer from the Catholic Education Office and the secretary of the Association of Non Government Education Employees.

At the first of the two meetings held on 27 November 1995, a series of questions were put to the applicant concerning his alleged behaviour and failure to follow the instructions of the principal. In view of the outcome of the court's decision, the most important of the questions was that which required him to admit 'that on 16 November you asked a female student to sit on your lap?' Puccio defended this question by arguing that he was teaching a long jump technique at the time and that as he was suffering from an injury this prevented his demonstrating the technique in the normal way. Thus having the student sit in his lap was, he argued, the most effective way of demonstrating the long jump technique.

In relation to the questions in general, Puccio argued that they lacked specificity as they failed to name the students concerned and that this 'inhibited his opportunity to give reasonable answers or explanations to the allegations'. von Doussa J however accepted the respondents' argument that although the names of the students had been contained in the initial draft of the questions, they had been removed in order, as von Doussa J himself noted, to ' protect the identity of the children, and the children themselves, from any further involvement'.

The meeting concluded with an option being put to Puccio that he could offer to resign and should he take this course of action the Catholic Education Office would retrain and find him another placement at its expense. A further meeting was arranged for the 29th of November at which Puccio indicated his decision not to proffer his resignation. He was then dismissed.

Reasons for Decision

von Doussa J found that the applicant had admitted to being a 'tactile person by nature' and that 'the demonstration' of the long jump 'constituted an unequivocal admission on the applicant's

behalf of physical contact with a student to the extent demonstrated'. He held that 'once the extent of the physical contact inherent in the demonstration given by the applicant … was admitted, that contact, viewed against the earlier warnings, provided a valid reason for the dismissal of the applicant. That conduct constituted serious misconduct. … It was also wilful'. As a consequence it was held that the respondents had 'discharged the onus of establishing a valid reason' for the dismissal under s. 170DE (1) of the Industrial Relations Act (1988) (Cth).

The court then had to determine whether the dismissal in terms of the legislation was 'harsh, unjust or unreasonable in all the circumstances'. In reaching his decision on this point von Doussa J noted that the argument of injury put forward by Puccio to defend his actions in his requiring the student to sit on his lap to demonstrate the long jump, was central to this issue. He noted, however that the defence was not one that had been put by the applicant prior to the court hearing and declared 'I view the explanation with such a degree of scepticism, that I am not prepared to find that the excuse is one honestly put forward. Rather it appears to be an excuse more recently invented to assist the presentation of his case'. He then went on to add that witnesses from the Catholic Education Office who had had long years of experience in teaching and in physical education training had convinced him that there were alternative techniques available that the teacher could have used instead of sitting the student on his lap.

In his findings von Doussa J noted that the applicant's explanations for his behaviour in his long jump demonstration failed 'altogether to recognise the rights, feelings and emotions of the child – emotions and feelings which in the result prompted the complaint by her'. He continued 'it fails to recognise the importance of the direction to the teacher, and his employer, the school, from complaints harmful to their respective reputations'.

Justice von Doussa concluded that the applicant was unable to establish that his dismissal had been unfair on the basis that 'Every consideration was shown to him both in the earlier stages when warnings were given and counselling was offered and in November, 1995'. While the court had to consider the effect the dismissal would have on the applicant, particularly in relation to his career and family, it was also necessary to consider the rights of the students. In this regard von Doussa J stated … 'the care, safety and well-being of students is a matter also entitled to great weight'.

In terms of great importance to school authorities and administrators the judge went on to add 'Where a teacher commits a clear breach of a direction squarely related to safety and welfare issues after due warning, the school, generally speaking, will be left with no option but to terminate the services of the teacher. To allow the teacher to continue would be to allow a foreseeable risk of further transgression by the teacher to occur. The school has a clear duty at law to take steps to guard its students against foreseeable risks adverse to their safety and welfare and will be held liable if it fails to do so and a claim is made against the school'.

Implications for Schools

It is clearly evident from this decision that a school which has a policy of non-touching of students has the right to dismiss staff for non-compliance with that requirement. A teacher's personal attitude to tactile behaviour with students is immaterial. It is important to note, however, that principals must have in place a process to manage those teachers, and indeed any other staff, who

fail to comply with school policies. In this regard the strategies used by the principal of the Mater Christie School to safeguard students and staff are illustrative of the steps needed.

In brief these strategies included:

- The use of the three-day 'Protective Behaviours' course as a means of ensuring that staff were made aware that students had a right not to be touched, and at which the school policy was clearly enunciated.
- Teachers were made aware that the no touching policy – except in emergency situations - was in their own interests as well as others in the school community and the school itself.
- A culture in place in the school which, acting on students' best interests, encouraged staff to report any concerns of 'improper' touching to the principal.
- The principal communicating relevant articles about not touching students to staff.
- The principal discussing her concerns with the teacher when the policy was not complied with.
- Formal interviews.
- Letters of warning.
- Options of retraining and replacement.
- Dismissal

Conclusion

Despite the decision in *Horan v Ferguson* that recognises teaching to be a tactile profession there are legitimate reasons for schools having a non-touching of students policy in place. In particular it can be argued that as school staff are in an authority position over students, particularly those in the younger age groups, these students may feel unable to express their wishes about being touched. In this circumstance a non-touching policy would be in the interests of all students. There is also the vexed question of a teacher defending allegations given the difficulties associated with evidence of children and this can cause unnecessary stress to the teacher as well as others in the school community.

On the other hand there will be, apart from emergency situations, occasions where teachers may have to touch students in some way. This may be the case for example, where a teacher acts as a 'spotter' for a student in some physical education activity. It might also be the case where a music teacher encourages a correct procedure when teaching the intricacies of string instruments by taking the student's fingers and placing them appropriately on the strings or the bow.

Schools then have to make a decision concerning whether they will implement a non-touching policy. Where such policies are introduced and there is a failure to comply, school authorities and school principals can rest assured, on the basis of the decision reached in Puccio's, case that courts will uphold their right to act in the students' best interests.